**DW 01-030**

**BODWELL WASTE SERVICES CORPORATION**

**Petition for Permanent Rate Increase**

**Order Approving Stipulation and Settlement Agreement**

**O R D E R  N O.  23,778**

**September 20, 2001**

**APPEARANCES:** Stephen P. St. Cyr for Bodwell Waste Services Corporation; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers, and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

## I. BACKGROUND AND PROCEDURAL HISTORY

On April 5, 2001, having previously submitted the requisite notice, Bodwell Waste Services Corporation (Bodwell or Company) filed a petition with the New Hampshire Public Utilities Commission (Commission) which included a set of schedules and supporting documentation seeking a permanent rate increase of approximately 43 percent. Bodwell currently serves 417 customers, who pay additional municipal fees because their sewage is ultimately disposed of by the City of Manchester. The Bodwell petition would have increased the Company's annual rate from $154.88 to $223.64 per customer. The Company did not seek a temporary rate increase.

In Order No. 23,678 (April 13, 2001), the Commission suspended the proposed rate schedules pending a full investigation of the proposed increase. The Commission

scheduled a pre-hearing conference on May 10, 2001 and directed that petitions to intervene be filed by May 7, 2001.

The Pre-Hearing Conference took place as scheduled and, in Order No. 23,709 (May 21, 2001) the Commission approved intervention petitions submitted by Hon. Real R. Pinard, a City of Manchester Alderman whose ward includes part of Bodwell's service territory, as well as Bodwell customers Michael H. Cunney, Richard Helie and Kevin McGauley. The Commission also approved a procedural schedule to govern the remainder of the docket.

Discovery commenced pursuant to the procedural schedule. On July 11, 2001, the Commission conducted a public hearing at the McLaughlin Middle School in Manchester. At that time, many Bodwell customers voiced their opposition to the proposed rate increase and several expressed the view that it is unfair to require them to pay sewer charges both to their municipality and to Bodwell.

On July 30, 2001, the Commission Staff (Staff) submitted the pre-filed testimony of Mark A. Naylor and Paul Tessier. The Office of Consumer Advocate (OCA) advised the Commission on July 31, 2001 that it would be appearing in the case on behalf of residential ratepayers. Intervenor Michael H. Cunney submitted pre-filed testimony on August 1, 2001.

As scheduled, a settlement conference took place on August 28, 2001. Bodwell, OCA and Staff were able to reach an agreement in principle on the outstanding issues in the docket. Staff filed the resulting written Stipulation and Settlement Agreement on September 6, 2001.

A merits hearing took place as scheduled on September 10, 2001. Messrs. Naylor and Tessier testified in support of the Stipulation and Settlement Agreement. Intervenors Cunney, Helie, McGauley and Pinard, although not signatories to the agreement, did not appear at hearing to contest it.

Subsequent to the hearing, Bodwell submitted an accounting of rate case expenses to Staff. The accounting is still under review.

## II. SUMMARY OF THE SETTLEMENT AGREEMENT

The Settlement Agreement calls for permanent rates of $201.31 per annum, payable quarterly at the rate of $50.33, compared to a present rate of $154.88 annually or $38.72 per quarter. This amounts to a rate increase of 29.98 percent.

The signatories agreed that extraordinary circumstances exist to justify a departure from the Commission's customary use of a 13-month average for determining the Company's rate base components. Specifically,

there was agreement to place in rate base the cost of a recently completed main replacement project that Bodwell was required to undertake because of a construction project on Interstate Route 93 over Bodwell Road. The Settlement Agreement notes that this project was outside the Company's normal capital improvement process, represents a significant portion of the rate base for a relatively small utility and, if excluded here, would justify the filing of a new rate case by the Company, leading to additional regulatory expenses.

Referenced in the Settlement Agreement is a $45,000 loan obtained by Bodwell in 2000 from its sole shareholder, real estate developer Robert LaMontagne. The Settlement Agreement notes that Bodwell failed to seek Commission approval under RSA 369 for the transaction. Accordingly, the Settlement Agreement includes the Company's agreement to seek such approval by petition within 30 days.

The Settlement Agreement also refers to the extension of the Company's mains into the Mill Pond subdivision. The signatories, including the Company, agreed that the relevant plant records of the Company are lacking in necessary detail. There is further agreement that certain revisions to the Company's amortization and depreciation expenses recommended by Staff are appropriate. These

revisions involve a downward adjustment to the applicable service lives of certain Company assets, but have no rate impact because the assets were contributions in aid of construction made by the Company's shareholder.

Under the Settlement Agreement, the Company may reclassify certain accrued interest as paid-in capital. The signatories stipulated that their intention is not to have any effect on present rates by such reclassification because of the Company's negative equity position. The Settlement Agreement further provides, explicitly, that such reclassification is not, and will not at any time be, appropriate for the Company's existing debts owed to its shareholder.

The Settlement Agreement seeks to deal with certain problems encountered by the Company in collecting from customers with significant arrearages. The signatories stipulated that the cost of such collections should be assigned to those customers who cause them. Accordingly, it was agreed that the Company would submit a revised tariff including an appropriate fee to be charged customers when collection efforts become necessary, with OCA and Staff agreeing to support such a tariff revision if the proposed charge provides the Company with no more than a reasonable

opportunity to recover collection-related expenses.

Finally, the Settlement Agreement provides that the new rates described therein would be effective with bills rendered on and after October 1, 2001. This would involve applying the new rates to service rendered in the third quarter of 2001, a period that was antedated by the Company's petition for rate increase.

## III. POSITIONS OF THE PARTIES AND STAFF

On behalf of Staff, Messrs. Naylor and Tessier testified in support of the Stipulation and Settlement Agreement. They testified that the provisions related to the extent of the Company's rate base was designed to assure that there would be no rate impact from the Company's having been required to abandon a portion of its force main in light of a construction project undertaken by the City of Manchester. According to the Staff witnesses, this was an intended result of the franchise expansion proceeding concluded last year in Docket No. DW 00-090. Although the Settlement Agreement approved in that docket allowed the Company to offset such rate base reductions by reducing what would otherwise have been contributions in aid of construction by the Company's shareholder in connection with the franchise expansion then at issue.

The Staff witnesses testified that reclassifying accrued interest as paid-in capital is appropriate because the Company is unable to pay the accrued interest, which therefore becomes the equivalent of forgiven debt. Messrs. Naylor and Tessier stressed that the signatories agreed to preclude the Company from ever seeking such treatment of the debt itself, regardless of whether the Company ever becomes able to repay the principal.

It was Staff's testimony that the proposed rate increase of nearly 30 percent – coming after a similar rate hike in 1998 and, thus, exceeding the rate of inflation – is not likely to recur in perpetuity. According to Staff, the Company has heretofore been in the process of stabilizing itself, its finances and its rate base.

Neither the Company nor OCA presented testimony in support of the Settlement Agreement. On cross-examination of Staff's witnesses, OCA made the point that the mains abandoned in connection with the City of Manchester's expansion project remain in rate base, but the Company is not charging customers for their depreciation. As already noted, the intervenors did not appear at the hearing to cross-examine Staff's witnesses or to take a position on the Settlement Agreement.

In response to Commission questions, the Company

noted that it inquired whether State funding would be available to cover its costs related to the Interstate 93 project and was told that no such assistance would be forthcoming.

## IV. COMMISSION ANALYSIS

We are required by RSA 378:7 to fix rates for regulated utilities that are "just and reasonable." Upon review of the Stipulation and Settlement Agreement entered into by Bodwell, OCA and Staff, we conclude that the permanent rates described therein are just and reasonable and, accordingly, we will approve the Settlement Agreement as submitted.

The Settlement Agreement as submitted represents an appropriate and reasonable compromise of the 43 percent rate increase originally sought by the Company. The Company's original filing made clear that a driving force in its request for higher rates was "to allow the Company an opportunity to pay principal and interest on its outstanding debt." The Company explained that it "has been unable to pay down its debt because the initial rate was set assuming that the original project [i.e., the real estate development comprising the Company's original service territory] was fully built out, which of course was not the case." The Company further explained that, even after a rate increase was approved in 1998, the debt service problem remained because "the increase in rates was based on a rate base that was less than the original debt of $400,000 plus the accrued interest."

Appropriately, the Settlement Agreement abandons the notion that Bodwell's rates should be set with an eye toward assuring that it can meet its debt service obligations. Traditional rate-of-return regulation involves permitting the utility to recover its prudently incurred operating expenses with, in addition, "the *opportunity* to make a profit on its investment, in an amount equal to its rate base multiplied by a specified rate of return." *Appeal of Conservation Law Foundation*, 127 N.H. 606, 634 (1986) (emphasis added, citation omitted). Implicit in this ratemaking methodology is the notion that, if a utility's managers operate the business diligently and appropriately, rates derived under this formula will allow the Company to meet its cost of capital, which in the case of this entirely debt-financed utility involves the satisfaction of loan obligations. If we were to increase Bodwell's rates based on the Company's inability in the past to make debt payments, we would essentially be engaging in ratemaking that is retroactive and therefore improper. *See, e.g., Appeal of Pennichuck Water Works*, 120 N.H. 562, 567 (1980) (concluding that "[i]n no event, may . . . rates be made effective as to services rendered before the date on which the permanent rate request is filed").

Another troubling aspect of the Company's debt

structure is its failure to seek the Commission's approval for the additional loan obligation it incurred last year. A utility may incur debt of this sort "with the approval of the commission but not otherwise." RSA 369:1. The importance of Commission review of such transactions is heightened when, as here, there is a less-than-arm's-length relationship between the creditor and the debtor. We are willing to agree with Staff that the Company's unexcused failure to seek Commission approval of its most recent debt financing can be mitigated by an immediate request for the appropriate review, but we caution the Company that there is some risk here of non-approval. We also stress that, because this issue arises here in the context of a Settlement Agreement we are aware that the lack of sanctions for wilful failure to comply with RSA 369 is the product of compromise and sets no precedent for how we would treat future situations of this sort.

Next we take up the question of whether Bodwell should be permitted to recover its costs for collecting on customer accounts that are in arrears by imposing those costs on the individual customers who cause them. We have previously endorsed such an approach as being for the public good. *See, e.g., Generic Investigation into IntraLATA Toll Competition Access Rates*, 78 NH PUC 283, 293 (1993); DRM 01-

078. There are, of course, countervailing arguments; the notion that customers in arrears 'cause' the cost of collecting on their accounts assumes that the customers in question are able to pay but choose not to remit. However, in the instance of a small utility such as this one, assigning collection costs to the customers for whom collection efforts become necessary is appropriate because of the limited customer base. In such a situation, socializing these costs would result in their representing an unreasonably high percentage of overall rates.

Of concern here is the Settlement Agreement's reference to an unspecified "appropriate fee," to be reflected in a revised tariff to be filed by the Company. It would be inappropriate to grant the Company carte blanche to determine this fee. Therefore, we will review the Company's proposed collection fee and, if we deem it to be in the public interest based on our initial review, will approve it on a *nisi* basis to permit other parties to state any objections.

Finally, although we approve the rate increase of nearly 30 percent contemplated by the Settlement Agreement, we note our concern about a company whose charges have increased approximately 60 percent since 1997. We accept Staff's view that in some sense this is a reflection of a company that is

still stabilizing itself following its relatively recent acquisition by its present owner, and therefore that rate increases well in excess of the rate of inflation are not likely to recur. Still, we share the concerns that we heard when we traveled to Manchester to conduct the public hearing in this docket. Bodwell Waste Services is not an independent company; it is owned by a real estate developer whose operation of this utility is obviously incidental to his main business of selling homes that, in this franchise territory, depend on Bodwell for sewer service. In these circumstances, it is reasonable to expect that the developer will craft an overall business plan, one that will include an appropriate level of contributed plant, that will not inflate Bodwell's rates in order to make home prices lower.

More importantly, Bodwell ratepayers should be aware that if rates are higher than they deem reasonable, this is at least in part a function of a fundamental inefficiency. In most municipalities with sewage disposal systems, all sewer-related services are provided by the municipality itself. The fact that Bodwell exists, to connect the subdivisions in its service territory with the City of Manchester's disposal system, is a function of municipal inability or unwillingness to extend its own mains into these areas. In our view,

municipalization of the Bodwell system would likely be the best way to assure that rates are kept to a minimum. We cannot require such a result, but we note the participation in this docket of elected officials who are in a position to encourage such an outcome.

The Commission thanks the intervenors in this docket, along with the Office of Consumer Advocate, for their effective participation in these proceedings. We are confident that the compromises reflected in the Stipulation and Settlement Agreement are reasonable and fair, and, therefore, that the rates included therein are in the public interest.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the Stipulation and Settlement Agreement entered into in this docket among Bodwell Waste Services, the Office of Consumer Advocate and the Commission Staff is APPROVED; and it is

**FURTHER ORDERED,** that approval of the Stipulation and Settlement Agreement does not imply Commission approval, acceptance, agreement with or consent to any concept, theory, principle or methodology underlying or supposed to underlie any matters, nor shall this approval be deemed to have established "settled practice" as the term is used in *Public*

*Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980); and it is

**FURTHER ORDERED,** that the permanent rates for Bodwell Waste Services Corporation set forth in the Stipulation and Settlement Agreement shall be effective with bills rendered on and after October 1, 2001; and it is

**FURTHER ORDERED**, that Bodwell Waste Services file a compliance tariff on or before October 1, 2001, at which time the Commission will review the Company's proposal for collection fees.

By order of the Public Utilities Commission of New Hampshire this twentieth day of September, 2001.

| Douglas L. Patch<br>Chairman | Susan S. Geiger<br>Commissioner | Nancy Brockway<br>Commissioner |
|---|---|---|

Attested by:

Thomas B. Getz
Executive Director and Secretary